JURISDICTION

The judgment of the court of appeals was entered on May 18, 1971, and was amended on July 12, 1971 (A. 193–198). The Board's petition for a writ of certiorari (No. 71–123) was filed on July 23, 1971, and Burns' petition (No. 71–198) was filed on August 9, 1971.[1] The petitions were granted on October 12, 1971 (A. 199–200).[2]

QUESTIONS PRESENTED

1. The question in No. 71–198 is whether the Board properly concluded that Burns was a successor to Wackenhut for purposes of the National Labor Relations Act, and is thus required to honor Wackenhut's obligation to bargain with the employees' union representative.

2. The question in No. 71–123 is whether a successor employer violates Section 8(a)(5) and Section 8(d) of the National Labor Relations Act by refusing to honor the outstanding collective bargaining agreement which its predecessor executed with the employees' union representative.

STATUTE INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 37–39.

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[1] On July 17, 1971, Mr. Justice Harlan extended Burns' time for filing a petition to and including August 16, 1971.

[2] With respect to Burns' petition, the grant of certiorari was limited to question 2, which contests the validity of the Board's successorship finding (A. 200).

STATEMENT

A. THE FACTS

The Wackenhut Corporation, a nationwide guard service firm, provided plant protection services for Lockheed Aircraft Service Company ("Lockheed") at Ontario International Airport in California between 1962 and July 1, 1967 (A. 4, 15, 16; 70–71, 76, 87–88, 145). On March 8, 1967, the Board certified the International Union, United Plant Guard Workers of America (the "Union") as the exclusive bargaining representative of Wackenhut's full-time and regular part-time employees performing plant protection duties for Lockheed at the airport (A. 4, 16–17; 146, 37). On April 29, 1967, Wackenhut and the Union entered into a three-year collective bargaining agreement, which contained a clause making the agreement binding on "successors and assigns" (A. 4, 17; 146, 148–173). The collective agreement provided for an immediate increase of 10 cents per hour in the wage rate of rank-and-file guards, and for additional 10-cent increases at specified future periods.[3]

Lockheed's contract with Wackenhut was for one year, with an expiration date of June 30, 1967 (A. 4, 17; 125, 128–134). In early 1967, Lockheed invited various guard services, including William J. Burns

[3] For example, the agreement provided that the starting hourly rate for such guards would go to $1.60 as of June 24, 1967, $1.70 as of April 26, 1968, and $1.80 as of April 26, 1969 (A. 165–166).

International Detective Agency, Inc. ("Burns")[4] to bid for the job then being done by Wackenhut (A. 4, 17; 127, 128, 130). Prior to making its bid, Burns was informed by Lockheed of the Union's certification and its April collective bargaining agreement with Wackenhut (A. 4–5, 17; 105, 126). Although Wackenhut submitted a bid, the successful bidder was Burns (A. 5, 15, 17; 127, 184, 105–106).

During June 1967, Burns assisted the American Federation of Guards, Local 1 ("AFG") in obtaining membership applications from Wackenhut guards who applied for jobs with Burns (A. 5–6, 17–21, 25; 40–49, 50–53, 57–59, 60–62, 64–66, 54–57, 103–104, 177). Some of these employees were advised that Burns "couldn't live with [the Union's] contract"; that they could not get uniforms without signing AFG applications; and that they had to join AFG in order to work for Burns (*e.g.*, A. 18–21). On June 29, Burns' branch manager, Ingle, concluded that a majority of the employees to be used at the Lockheed job had signed AFG applications and, accordingly, recognized the AFG as their bargaining representative (A. 5–6, 22; 101–103, 106, 123).

Burns officially began performing the guard services on July 1 (A. 5, 17; 145). On that date, Burns' Lockheed work force of 42 employees consisted of 27 guards who had formerly been employed by Wacken-

[4] After the court of appeals' decision, this corporation changed its name to "Burns International Security Services, Inc." Pet. in No. 71–198, p. 1, n.*.

hut and 15 guards who were transferred from other Burns jobs (A. 5, 17, 21; 146, 103).[5] The Burns guards performed basically the same services at the Lockheed facility that the Wackenhut guards had performed (A. 5, 17, 21; 49–50, 53, 59–60, 62, 125, 130, 136). Although Burns used its own supervisors, their functions and responsibilities were similar to those of their Wackenhut predecessors (A. 73–75, 92–93, 94–95).[6]

On July 12, the Union demanded that Burns recognize it as the bargaining representative of Burns' employees at Lockheed and honor the collective bargaining agreement between the Union and Wackenhut (A. 5, 22, 25; 146, 174–175). By letter of July 24, Burns declined to recognize the Union, because "any guards employed by our Los Angeles office at Lockheed * * * are members of and are represented by [AFG], a Union with whom our Los Angeles office now has a collective bargaining agreement and has had for over a period of years" (A. 5, 22, 25; 146, 176).

B. THE BOARD'S DECISION AND ORDER

The Board held that Burns violated Section 8(a)(2) and (1) of the Act by assisting AFG in organizing employees and by recognizing AFG when it did not represent an uncoerced majority of Burns' em-

[5] Wackenhut's work force on the Lockheed job had also consisted of about 42 guards (A. 76).

[6] Burns' job supervisor at Lockheed had worked for Wackenhut prior to the takeover (A. 94).

ployees (A. 5–6). The Board also found that a bargaining unit limited to Burns guards working for Lockheed was appropriate and that Burns was a successor employer to Wackenhut since it continued essentially the same operation (A. 5–6, 21). Accordingly, the Board held that Burns violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union (A. 5–8). Finally, the Board (with Member Jenkins dissenting) held that, as a successor to Wackenhut, Burns was obligated to honor the contract between Wackenhut and the Union, and that, by failing to do so, Burns further violated Section 8(a) (5) and (1) of the Act (A. 6–11).

In deciding that Burns was bound by its predecessor's collective bargaining agreement, the Board relied principally on this Court's decision in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (A. 6–8). The Board also concluded that its decision effectuated the policies of the Act, particularly "Congress' recognition [in Section 8(d), *infra,* pp. 37–38] of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements" (A. 9–10).

The Board ordered Burns to cease and desist from its unfair labor practices; to withdraw and withhold recognition from the AFG unless and until it was certified by the Board; to bargain collectively with the Union on request; to honor, adopt, and enforce the contract between Wackenhut and the Union, to give it retroactive effect, and to make the employees whole for any

losses suffered by reason of Burns' refusal to honor the contract; and to post appropriate notices (A. 11, 25–29).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's finding that Burns violated Section 8(a)(2) and (1) of the Act by unlawfully assisting and recognizing the AFG (A. 187–188). It also sustained the Board's finding that a bargaining unit limited to Burns guards working for Lockheed was appropriate (A. 188). In addition, it agreed with the Board that Burns was a successor employer to Wackenhut and, as such, was required to recognize the union chosen by Wackenhut's employees (A. 189).

The court held, however, that the Board had "exceeded its powers" in ordering Burns to honor the contract executed between Wackenhut and the Union, since "[n]either the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement" (A. 190). The court stated (A. 190):

> The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.*, at 102. * * *

Nor, in the court's view, did *Wiley, supra*, sanction such a requirement, for that case merely holds that "'in appropriate circumstances * * * the successor employer may be required to arbitrate with the union under the agreement'." (A. 191–192).

SUMMARY OF ARGUMENT

I

Where a transfer of operations leaves the identity of the employing enterprise substantially intact the original employer's duty to recognize and bargain with an incumbent union devolves upon the new employer as a "successor employer." Whether the employing enterprise remains substantially the same is determined by an evaluation of the total circumstances. As the court below correctly concluded (A. 189), "All of the important factors which the Board has used and the courts have approved [for finding successorship] are present in the instant case: 'continuation of the same type of product lines, departmental organization, employee identity and job functions.'" Thus (*ibid.*):

Accordingly, the court of appeals' judgment omits the requirement in the Board's order (A. 26–27) that Burns make the employees whole for any losses suffered by reason of its refusal to honor the contract (A. 193–197). However, because the court found that Burns was under a duty as Wackenhut's successor to bargain with the Union, the judgment, as amended, does require Burns to make the employees whole for any losses suffered as a result of its unilateral changes in working conditions (A. 189, 197). Cf. *Valleydale Packers, Inc.*, 162 NLRB 1486, 1487, enforced 402 F. 2d 768 (C.A. 5), certiorari denied, 396 U.S. 825.

Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.

II

The goal of federal labor policy is to minimize industrial strife by encouraging employers and unions to establish and maintain written collective bargaining agreements. Had Wackenhut repudiated its collective agreement with the Union in July 1967, it not only would have subjected itself to a suit for breach of contract under Section 301 of the Labor Management Relations Act, but it also would have refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act. If Burns succeeded to Wackenhut's bargaining obligations under the Act and thus was required to recognize and bargain with the Union, the policy of stability reflected in Section 8(d) of the National Labor Relations Act would be furthered by concluding, as the Board did, that Burns was also obliged to honor the collective agreement which Wackenhut had entered into for the employing enterprise. The Board's position rests on legally sound grounds.

A. A collective bargaining agreement is not an ordinary contract. Rather, it is a set of rules for the industrial community which are established by the employer and the union in accordance with procedures prescribed by the National Labor Relations Act. These rules bind the bargaining unit employees by virtue of the federal labor laws rather than principles of contract law. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332.

B. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, establishes that under federal law the collective bargaining agreement survives the transfer of the employing enterprise to a successor employer. In a suit to compel arbitration under Section 301 of the Labor Management Relations Act, the Court held that, notwithstanding his lack of consent, the successor was bound by the arbitration provisions of the predecessor's collective bargaining agreement. Necessarily implicit in this decision was that the collective bargaining agreement itself was binding on the successor. The duty to arbitrate was created by and flowed from the collective bargaining agreement, and could have bound the successor only because the contract also bound it. Indeed, in two respects the present case is stronger than *Wiley* for concluding that the rights under the collective bargaining agreement survived the change of employers.

C. While the policy favoring arbitration is of importance to national labor policy, the policy of encouraging the maintenance of existing collective bar-

gaining agreements, which is reflected in Section 8(d) of the National Labor Relations Act, is of equal significance. If a mere change in the identity of the employer terminates the existing collective agreement, and thus requires the parties to negotiate a new one, a strike is likely if either party seeks terms more favorable to it than those which previously existed. On the other hand, if the agreement automatically continues in effect, the union and the new employer will have a period of contract continuity during which, in administering the contract, they may be able to establish a foundation for a permanent, harmonious bargaining relationship. Moreover, to require the parties to honor the collective agreement entered into by the predecessor would afford to the employees the basic security conferred by the agreement, and to the successor employer the advantages of predictable labor costs and a period of industrial stability.

The court of appeals erred in concluding that *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, requires a contrary conclusion. In *Porter*, a contract covering the unit employees had never been agreed to, and the Court held that the Board could not require the employer to agree to a particular provision the union sought. Here, however, a contract has been executed by the predecessor employer and the union without any intervention by the Board. The new employer, by electing to conduct essentially the same business operation, stands in the predecessor's shoes by operation of law.

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Concluding that ordinarily a successor-employer is required to honor his predecessor's contract does not mean that in every circumstance the contract should survive a change of employers. As this Court pointed out in *Wiley*, there must be a "continuity of identity in the business enterprise." (376 U.S. at 551). This is assured if the new employer is a "successor employer" under the holdings of the Board and this Court.

ARGUMENT

When an employer takes over the business operation of another employer who has a collective bargaining agreement with a union, two questions are presented under the National Labor Relations Act: (1) is the new employer required to recognize and bargain with the union; and (2) if this question is answered affirmatively, is the new employer also required to honor the predecessor's collective bargaining agreement.

We argue in Point I that, on the facts here, the Board properly concluded that Burns was a "successor" to Wackenhut and thus required to bargain with the Union. In Point II, we argue that the Board properly concluded that, as a successor, Burns was also required to take over and honor the collective bargaining agreement negotiated for the employing enterprise by Wackenhut.

I. THE BOARD PROPERLY CONCLUDED THAT BURNS WAS A SUCCESSOR TO WACKENHUT WITH RESPECT TO THE LOCKHEED SERVICE OPERATIONS, AND THUS REQUIRED TO HONOR WACKENHUT'S OBLIGATION TO BARGAIN WITH THE UNION

As the Sixth Circuit long ago observed in *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 183:

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the [National Labor Relations] Act in the interest of industrial peace * * *. It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency. * * *

It is, therefore, settled that the mere transfer of operations from one employer to another does not extinguish the obligation to bargain under the Act; if such transfer leaves substantially intact the identity of the employing enterprise, then the duty of the original employer to recognize and bargain with an incumbent union devolves upon the new employer as a "successor employer." *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 304 (C.A. 5). Accord: *Makela Welding Inc.* v. *National Labor Relations Board*, 387 F. 2d 40, 46 (C.A. 6); *National Labor Relations Board* v. *Armato*, 199 F. 2d 800, 803 (C.A. 7); *National Labor Relations Board v. Quaker Tool & Die, Inc.*, 403 F. 2d 1021 (C.A. 6). This obligation precludes the successor employer from making changes in existing employment conditions without

negotiation with the union. See *Overnite Transportation Co.* v. *National Labor Relations Board,* 372 F. 2d 765, 768 (C.A. 4), certiorari denied, 389 U.S. 838. A "successor employer" is also obliged to remedy his predecessor's unfair labor practices. See *United States Pipe and Foundry Co.* v. *National Labor Relations Board,* 398 F. 2d 544 (C.A. 5).

The question whether the employing enterprise remains substantially the same is determined by such criteria as whether (1) the same business operations are being continued; (2) the same plant is used; (3) the same or substantially the same work force is employed; (4) the same jobs exist under the same working conditions; (5) the same supervisors are employed; (6) the same machinery, equipment, and methods of production are used; and (7) the same product or service is manufactured or performed. Not all of these factors are necessary to warrant a finding that the employing enterprise has continued; that determination is based on an evaluation of the total circumstances. See *Maintenance, Inc.,* 148 NLRB 1299, 1300–1303; *Lincoln Private Police, Inc.,* 189 NLRB No. 103, April 12, 1971, 76 LRRM 1727, 1729–1730; Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 N.W.U.L. Rev. 735, 793–806 (1969). See, also, *Thomas Cadillac,* Inc., 170 NLRB 884, affirmed *sub nom. Int'l Assoc. of Machinists* v. *National Labor Relations Board,* 414 F. 2d 1135 (C.A.D.C.), certiorari denied, 396 U.S. 889; *Chemrock Corp.,* 151 NLRB 1074.

The record shows that the basic employing enterprise—the provision of guard service for Lockheed at the airport—retained its essential characteristics despite the change in contractors. It continued to provide the same services it previously had provided for Lockheed at Ontario Airport, but under the management of Burns instead of Wackenhut, pursuant to a contract with Lockheed which was similar to Wackenhut's contract (A. 129–144, 125). Wackenhut terminated its guard service operations at midnight, June 30, and Burns began substantially the same operations on July 1, with a total work force of 42 employees which included 27 of the 42 guards who were formerly employed by Wackenhut, and 15 employees who were transferred from other Burns jobs (A. 76, 102–103, 146).

A majority of the Burns guards at Lockheed were selected from employees of the predecessor employer, to perform the same tasks in substantially the same manner and at the same location as they had in the past (A. 49–50, 53, 59–60, 62). Moreover, although Burns for the most part used its own supervisors, its supervisory setup was similar to that of its predecessor, Wackenhut. Both utilized area supervisors who performed identical functions (A. 73–74, 92), and both had a full-time supervisor on each job with similar functions, including authority with respect to hiring and discharge—Wackenhut called that supervisor a "facility supervisor" and Burns, a "job supervisor" (A. 74–75, 78, 79, 94–95, 125, 133 para. 13, 138 para.

12). Indeed, Burns' job supervisor at Lockheed had worked for Wackenhut prior to July 1 (A. 94).

Finally, Burns did not treat the employees servicing Lockheed either as part of its existing group of unrepresented guards in the Ontario Sub-office area, or as part of an existing represented unit covering guards in parts of the Ontario and Los Angeles Sub-office areas. It treated them as a separate unit. Burns assisted the AFG in obtaining authorization cards from the guards servicing Lockheed, and then recognized the AFG as their bargaining representative in the very unit for which the Union had been certified three months earlier (A. 84–87, 178, Sec. 1, *supra,* p. 4). Burns' reasons for such separate treatment of the Lockheed guards are suggested by the testimony of its branch manager that the size of the job made it "an unusual job. It stands in a class by itself" (A. 104). As a direct result of the bargaining history under Wackenhut, Burns paid the former Wackenhut employees working at Lockheed more than it paid its other employees in the Ontario Sub-office area (A. 95, 108, 62–63, 180).

In sum, as the court below correctly concluded (A. 189), "[a]ll of the important factors which the Board has used and the courts have approved [for finding successorship] are present in the instant case: 'continuation of the same type of product lines, departmental organization, employee identity and job functions,' " quoting from *National Labor Relations Board* v. *Zayre Corp.,* 424 F. 2d 1159, 1163 (C.A. 5).

The case would be different if, instead of continuing the existing enterprise, Burns inaugurated a wholly different one, using solely its own regular personnel and new operating methods and techniques in providing guard service at the airport. In that situation Burns would not be a successor employer to Wackenhut.

Burns suggests (Pet. in No. 71–198, p. 12), however, that it was not Wackenhut's successor because there were no business dealings between it and Wackenhut concerning the transfer of the latter's operations. A finding of successorship for purposes of the National Labor Relations Act, however, does not require privity between the old and the new employers. The question is whether the new employer has taken over the employing enterprise and it is irrelevant whether he does so as a result of negotiations with the predecessor employer or with a third party, here the firm which engaged the employer. *Tom-A-Hawk Transit, Inc.* v. *National Labor Relations Board*, 419 F. 2d 1025, 1027–1028 (C.A. 7); *Maintenance, Inc.*, 148 NLRB 1299, 1301.

Burns also urges (Pet. in No. 71–198, p. 12) that, within six months after it commenced performance at the Lockheed facility, "former Wackenhut guards constituted less than a majority of the work force." But "[i]n a case concerning a successor employer, principles of fair play require that we look to the time of the succession." *National Labor Relations Board* v.

Auto Ventshade, Inc., supra, 276 F. 2d at 307.[8] To apply a different test here, would enable Burns to escape the consequences of its wrongful refusal to recognize the Union upon taking over the service operation.[9]

The cases on which Burns relies (Pet. in No. 71–198, p. 13) are factually distinguishable. In *National Labor Relations Board* v. *Alamo White Truck Service, Inc.,* 273 F. 2d 238, the Fifth Circuit found no successorship where the alleged successor's labor policy was decided on a local basis, whereas the predecessor's had been determined by a head office hundreds of miles away; moreover, there was a change in the type of business being done. See the discussion of *Alamo* in *National Labor Relations Board* v. *Zayre Corp.,* 424 F. 2d 1159, 1163–1164 (C.A. 5), and in *National Labor*

[8] As previously noted, 27 of the 42 guards whom Burns employed at Lockheed when it took over the service operation in July 1967 formerly worked at Lockheed in the employ of Wackenhut (A. 5, 17, 21; 102–103, 146). By December 1967, less than half—and (according to Burns' motions to the Board to reopen the record) by October 1969, less than a third—of the guards employed by Burns at Lockheed were former Wackenhut employees (A. 146–147, 30–35).

[9] Employee turnover does not warrant an employer withdrawing recognition prior to the end of the certification year (March 1968, here). *Brooks* v. *National Labor Relations Board,* 348 U.S. 96; *Armato, supra,* 199 F. 2d at 803. Moreover, an unlawful refusal to bargain within the certification year is not excused by a loss of majority (through turnover or otherwise) occurring subsequent to such refusal. *National Labor Relations Board* v. *Patent Trader, Inc.,* 426 F. 2d 791 (C.A. 2); *Armato, supra; National Labor Relations Board* v. *Quaker Tool & Die, Inc.,* 403 F. 2d 1021 (C.A. 6).

Relations Board v. *Ideal Laundry Corp.*, 422 F. 2d 801, 803–804 (C.A. 10). Here, the Lockheed guard service was transferred from one nationwide organization to another, and the same service continued to be performed. In *Lincoln Private Police, Inc.*, 189 NLRB No. 103, April 12, 1971, 76 LRRM 1727, unlike here, the prior employer's business was divided among several different firms, with the alleged successor acquiring less than a majority of the prior employer's customers.

II. THE BOARD PROPERLY CONCLUDED THAT BURNS, AS A SUCCESSOR TO WACKENHUT, VIOLATED SECTIONS 8(a)(5) AND 8(d) OF THE NATIONAL LABOR RELATIONS ACT BY REFUSING TO HONOR THE OUTSTANDING COLLECTIVE BARGAINING AGREEMENT WHICH WACKENHUT HAD EXECUTED WITH THE UNION

This Court has stated:

> The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. * * * [*Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 295.]

In recognition of this purpose and the importance of maintaining collective bargaining agreements, Congress provided in Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 (*infra*, p. 39), for judicial enforcement of collective agreements under

federal law. See *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. Moreover, Congress enacted Section 8(d) of the National Labor Relations Act (*infra*, pp. 37–38), which defines the duty to bargain collectively as including "the execution of a written contract incorporating any agreement reached," and adds that, "where there is in effect a collective-bargaining contract * * * no party to such contract shall terminate or modify such contract, unless" it serves prescribed notices on the other party and maintains the contract in effect for 60 days thereafter or until its expiration date, whichever is later. Section 8(d) also provides that a party to a collective bargaining contract has the right to refrain from discussing or agreeing to modifications in contract terms or conditions, if such modifications are to take effect prior to the period fixed by the contract for reopening these matters.

Accordingly, had Wackenhut repudiated its collective agreement with the Union in July 1967, it not only would have subjected itself to a suit for breach of contract under Section 301 of the Labor Management Relations Act, but it also would have committed the unfair labor practice of refusing to bargain, in violation of Sections 8(a)(5) and 8(d) of the National Labor Relations Act. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 359; *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 968–969 (C.A. 8). We have shown in Point I that Burns succeeded to Wackenhut's bargaining obligation under the Act and thus was required to recognize

and bargain with the Union.[10] The policy of stability reflected in Section 8(d) would be furthered by concluding, as the Board did, that Burns was also obliged to honor the collective agreement which Wackenhut had entered into for the employing enterprise.

We show below that the Board's position rests on legally sound grounds. Specifically, we show that (1) the question whether a successor employer is bound by his predecessor's collective agreement is to be determined not by principles of contract law, but by those of federal labor law; (2) *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, establishes that under federal labor law a successor employer must honor his predecessor's collective bargaining agreement; and (3) to require a successor employer to do so furthers the puposes of the National Labor Relations Act without impairing other legitimate interests.

A. Federal labor law rather than contract law determines whether a successor employer is bound by his predecessor's unexpired collective bargaining agreement

Under ordinary contract law, a contract is not normally binding on one who has not consented to be bound thereby. A collective bargaining agreement,

[10] Hence, even apart from the effect of the contract, Burns was precluded from unilaterally changing existing terms and conditions of employment without first bargaining with the Union. See pp. 13–14, *supra.*

however, is not simply another contract. See Cox, *Rights Under A Labor Agreement,* 69 Harv. L. Rev. 601(1956). It is a set of rules, established by the employer and the union in accordance with procedures prescribed by the National Labor Relations Act, governing the bargaining unit—the industrial community. These rules are binding upon the employees not by virtue of contract law, but by virtue of the federal labor laws.

Thus, once a union is selected by the majority of employees in a bargaining unit, it has authority to take action that binds *all* employees, including those who do not want it to represent them. In addition, all employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in negotiation or ratification of the agreement, are also bound. Moreover, no individual employee has the right to make a private agreement with the employer which is inconsistent with the collective agreement. *J.I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332. As the Court said in *Case* (at 335):

> Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service * * * which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established.

Thus, in order to determine who is bound by a collective agreement, and under what circumstances, it is necessary to look not to the law of contracts, but to the principles and policies of the federal labor law.

B. John Wiley & Sons v. Livingston, 376 U.S. 543, establishes that under federal labor law a successor employer must honor its predecessor's collective bagaining agreement

John Wiley & Sons v. *Livingston,* 376 U.S. 543, involved a dispute between the successor employer (Wiley), into which the predecessor employer (Interscience) had merged, and the union which represented the predecessor's employees, regarding the effect of the merger on certain employment conditions that existed under the collective bargaining agreement between Interscience and the union.[11] The contract contained an arbitration provision, but no provision making it binding on Interscience's successors (376 U.S. at 544). In a suit by the union to compel arbitration under Section 301 of the Labor Management Relations Act, the Court held (376 U.S. at 548) that "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present

[11] At the time of the merger, Interscience had about 80 employees, of whom 40 were represented by the union. Wiley had a separate plant and about 300 employees, none of whom was represented by a union. Virtually all the Interscience employees eventually transferred to the Wiley plant. 376 U.S. at 545, 551.

here, the successor employer may be required to arbitrate with the union under the agreement." It explained (376 U.S. at 550):

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. * * * Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance * * * and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. * * * [Footnote omitted.]

The Court stated (376 U.S. at 549):

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength * * * of the contending forces" * * *.[12]

[12] Prior to its decision herein, the Board, applying traditional contract principles, held that a successor employer was not bound by his predecessor's collective bargaining agreement un-

The court below, in distinguishing *Wiley* (A. 191–192), stressed that that decision dealt only with the duty to arbitrate. But since *Wiley* was a suit to compel arbitration, the Court had to decide only whether the arbitration clause of the contract was binding on the successor.[13] Once it decided that the clause was binding, all questions as to the scope, meaning and application of the contract were for the arbitrator. It was necessarily inherent in the *Wiley* decision, however, that the rights created under the contract survived the merger. The duty to arbitrate was created by and flowed from the contract and the dispute involved the interpretation of the contract; the Court rejected Wiley's contention that the merger "[a]utomatically terminate[d] all rights of the employees covered by the agreement" (376 U.S. at 548).

The basic rationale of *Wiley*, we submit, is that the rights created under the contract, including the right to arbitrate disputes thereunder, did survive the merger and that the contractual provision for arbi-

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less he expressly assumed that contract. See *Rohlik, Inc.*, 145 NLRB 1236, 1242, n. 15; *General Extrusion Co.*, 121 NLRB 1165, 1168. The Board changed its position largely because this Court's decision in *Wiley* "altered the perspective in which a successor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed" (A. 6).

[13] "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 569.

tration properly was to be utilized to determined how the provisions of the contract should be applied to the successor. The courts of appeals that, following *Wiley,* have dealt with suits to compel successor employers to follow the arbitration provisions of collective bargaining contracts executed by their predecessors, have recognized this broader implication of *Wiley.* In *Wackenhut Corp.* v. *United Plant Guard Workers,* 332 F. 2d 954 (C.A. 9), the court stated (p. 958) that under *Wiley* "the policy of the national labor laws obligates Wackenhut, as the successor employer, to honor the collective bargaining agreement entered into by its predecessor, General Plant." In *United States Steelworkers* v. *Reliance Universal Inc.,* 335 F. 2d 891 (C.A. 3), the court stated (p. 895) that "the 1962 collective bargaining agreement, as an embodiment of the law of the shop, remained the basic charter of labor relations at the Bridgeville Plant after the change of ownership." See also *United States Gypsum Co.* v. *United Steelworkers,* 384 F. 2d 38 (C.A. 5), certiorari denied, 389 U.S. 1042; *Bath Iron Works* v. *Bath Marine Draftsmen's Ass'n,* 393 F. 2d 407 (C.A. 1).

In the present case, neither party invoked the arbitration provisions of the collective bargaining agreement. Rather, the Union filed a charge with the Board alleging that Burns' refusal to bargain with the Union and to honor the agreement constituted unfair labor practices under the National Labor Relations Act. The Board, after concluding that Burns was obligated to bargain with the Union, could have declined to decide whether the refusal to honor the col-

lective agreement was also an unfair labor practice, and required the Union, instead, to seek enforcement of the agreement by invoking its arbitration provisions and instituting a suit under Section 301 to compel arbitration, as in *Wiley*.

The Board, however, has discretion to decide whether to defer to the arbitral process; it is not required to do so. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357; *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 436–437. Since the Board had before it for adjudication the other unfair labor practices charged by the Union (which were not subject to arbitration under the collective agreement), the agency properly declined to segmentize this controversy—adjudicating part of it itself, and requiring the parties to submit the other, interrelated portion to arbitration.

In deciding that the duty to bargain imposed by the National Labor Relations Act required a successor employer, like Burns, to honor its predecessor's collective agreement, the Board reached the same conclusion for purposes of that Act that *Wiley* had already implicitly reached for purposes of a contract suit under Section 301 of the Labor Management Relations Act.[13a] Indeed, in at least two respects, the present case is stronger than *Wiley* for concluding that the rights under the collective agreement survived that change of employers.

[13a] The National Labor Relations Act and Section 301 are both part of the Labor Management Relations Act and, as such, are to be construed harmoniously. See *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 702–703.

(1) In *Wiley*, the Court noted that the collective bargaining agreement "did not contain an express provision making it binding on successors of Interscience" (376 U.S. at 544). In the present case the agreement bound "successors and assigns" (A. 150). Prior to bidding for the contract, Burns was informed by Lockheed of the existence of the agreement (A. 105, 126) and presumably it either was aware of that provision or could readily have ascertained its existence.

(2) In *Wiley*, each of the merging companies had its own plant (376 U.S. at 545); after the merger the Interscience employees who remained with Wiley transferred to its plant (p. 551). There was thus more than a formal change in employers; the actual place and conditions of employment also were changed. In the present case, in contrast, the only change was the substitution of Burns for Wackenhut as the employer, with a corresponding substitution of some supervisors; the Burns employees continued to perform the identical work at the identical place they had previously performed as employees of Wackenhut and, indeed, two-thirds of them previously had worked for Wackenhut.

This case is different from *Wiley* in that in the latter the predecessor employer was merged into the successor, whereas here there was a substitution of one employer for another to perform the same work at the same plant. *Wiley* indicates, however, that this difference is immaterial. It pointed out (376 U.S. at 549) that the federal policy of settling labor disputes

by arbitration would be just as much thwarted if the duty to arbitrate were terminated by "a change in the corporate structure or ownership of a business enterprise" "in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same."[14]

The remaining question, therefore, is whether the Board properly concluded that the duty to bargain imposed by the National Labor Relations Act requires a successor employer such as Burns to honor the predecessor's collective bargaining agreement. As we now contend, the Board's decision that Burns is bound by the contract properly effectuates the federal labor policy of avoiding industrial strife by carrying out collective bargaining agreements.[15]

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[14] *Ranch-Way, Inc.* v. *National Labor Relations Board*, 445 F. 2d 625 (C.A. 10), pending on petition for certiorari, No. 71–589, involves the obligation of a successor employer who became such by purchasing the business of its predecessor, to honor the latter's collective bargaining agreement.

[15] The holding that a successor employer is bound by the predecessor's collective agreement simply requires the successor to grant the employees whatever rights and benefits they are entitled to under the agreement. It does not settle the entirely separate question as to what the agreement means. The successor would have the same right as the predecessor had under the agreement to adapt the agreement to new and unforeseen conditions, and any dispute over the propriety of the successor's action would be for the arbitrator to resolve. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579–581.

C. The Board properly concluded that, except in unusual circumstances, a successor employer such as Burns is required to honor his predecessor's collective bargaining agreement

1. In the present case the Board, after concluding that Burns, as a successor employer, was required to bargain with the union that represented Wackenhut's employees (A. 8–9), stated (A. 9):

> The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

This conclusion reflected and was based upon several important policy considerations.

a. The Board noted (A. 9–10) the importance of maintaining collective bargaining agreements in order to promote industrial peace, the dominant objective of the National Labor Relations Act. If a mere change in the identity of the employer terminates the existing collective agreement, the new employer and the union must immediately, at a time of uneasiness over the change of employer, proceed to negotiate a new contract. If a party—employer or union—seeks terms more favorable to it than those which previously existed, a strike is likely. A union, representing employees who are performing the same jobs in the same enterprise, is not likely to submit voluntarily to a reduction in the standards which it had negotiated

with the prior employer. Similarly, a new employer would be unlikely to agree to terms and conditions of employment more burdensome than those which the union had previously accepted for the very time period in question.

On the other hand, if the agreement automatically continues in effect, the union and the new employer will have the period of contract continuity during which, in administering the contract, they can get to know each other and the new employer can get to know the enterprise. This, in turn, may well establish a foundation for informed and effective negotiation of a new agreement when the contract expires, thereby averting a strike.

b. To require the successor to honor the collective agreement entered into by his predecessor more fully protects the employees' right to bargain through representatives of their own choosing. As the Board pointed out (A. 10), in the normal case the successor employer "can make whatever adjustments the acceptance of such obligation [*i.e.*, to honor the predecessor's collective agreement] may dictate in his negotiations concerning the takeover of the business." But "employees cannot make a comparable adjustment"; "[t]heir basic security is the collective-bargaining agreement negotiated on their behalf." This security is tenuous if a change in the identity of the person who continues to operate the same basic enterprise—a change the employees are powerless to prevent—is sufficient to abrogate the bargain which the em-

ployees' union representative negotiated on their behalf with the former employer.[16]

c. A rule binding the parties in a successorship situation to pre-existing contractual obligations is not likely to have a deterrent effect upon the transfer of business enterprises. See the Board's opinion, A. 10–11. On the contrary, there are advantages to a prospective purchaser in knowing that he has a stable labor relationship when he takes over the work. He is able to forecast his labor costs with greater accuracy than if he were facing contract negotiations and a possible strike.[17]

2. Contrary to the opinion below (A. 190–191), to require a successor employer to honor his predecessor's collective agreement is not inconsistent with *H.K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. In *Porter*, a contract covering the unit em-

[16] The Board added (A. 10–11):

> In the instant case this is certainly so. They work in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing. The contract involved herein was negotiated for a term of 3 years, but had been in existence for only 2 months at the time of Burns' takeover. Burns had knowledge of the agreement when it bid for the Lockheed service contract. It hired employees on whose behalf the agreement was negotiated. * * *

In the present case, Burns was aware of Wackenhut's agreement with the Union before it placed its bid (*supra*, p. 4), and thus could have figured the increased labor cost which it would have entailed either in its bid or in any subsequent negotiations with Lockheed.

[17] If the agreement is binding on the new employer, it also remains binding on the union. *Kota Division of Dura Corp.*, 182 NLRB No. 51, May 7, 1970, 74 LRRM 1104.

ployees had never been agreed to. The Court held that, in these circumstances, the Board could not order an employer to accept a particular provision sought by the union. Here, however, a contract has been executed between the predecessor employer and the Union without any intervention by the Board, and the new employer, by electing to conduct essentially the same business operation, with many of the same employees, stands in the predecessor's shoes by operation of law.

The Court noted this critical distinction in *Wiley*, stating (376 U.S. at 550): "This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." It is, in short, the principle expressed in *Wiley*, and not the holding of *Porter*, which controls this case.

3. In holding that ordinarily a successor-employer is required to honor his predecessor's collective bargaining contract, the Board recognized that there may be "unusual circumstances" in which the rule might be otherwise (A. 9). This exception reflects the statement in *Wiley* (376 U.S. at 551) that "[w]e do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives."

Some of the possible exceptions were described in *Wiley*. The Court there pointed out (*ibid*): "[T]here may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably

to be found in the particular bargaining agreement and the acts of the parties involved." Were there such a lack of continuity of the enterprise, however, the new employer would not be a successor as the Board and the courts have defined that term.

Another exception may exist for certain government contracts for the performance of services at government installations or facilities. Many of such contracts must be awarded, sometimes annually, on a competitive basis under the Armed Services Procurement Act of 1947, 62 Stat. 21, as amended (10 U.S.C. 2301 *et seq.*), or the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended (41 U.S.C. 251 *et seq.*). Such contracts are also required by the Service Contract Act of 1965, 79 Stat. 1034, 41 U.S.C. 351 *et seq.*, to be at not less than prevailing labor rates.

When a government contractor whose contract is up for renewal believes or suspects that he will lose it, or that all additional costs will be borne by the government in the new contract, he may have little incentive vigorously to oppose the union's demands for substantial increases in wages and benefits, since such additional costs of doing business will be borne not by himself but by his successor or the government.[18] The result is likely to be that the government will be required to pay substantially higher costs for the goods and services

[18] In the present case, however, Wackenhut had performed services for Lockheed for many years; it had every expectation of obtaining, and indeed bid for, a renewal of its contract; and the wage increases which it agreed to with the union were modest (see *supra*, p. 3).

it obtains in a situation where, as a practical matter, it is unable to protect itself against such increased costs.

The Board has recognized that, in the case of certain government contracts, a successor employer may not be bound by its predecessor's collective bargaining agreement. In *Emerald Maintenance, Inc.*, 188 NLRB No. 139, March 5, 1971, 76 LRRM 1437, pending on petition to review, C.A. 5 (Nos. 71–1402, 71–1591, argued November 29, 1971), decided after the present case, the Board held that the successor employer was not bound by the predecessor's agreement where the contract was subject to annual rebidding, it was awarded following invited bids with no opportunity for negotiation, and the minimum wage rates were fixed by administrative determination under the Service Contract Act without consideration of prospective wage increases. The Board has not yet had occasion to rule on whether government contracts, in other circumstances, also are not subject to the doctrine that the successor employer is bound by the predecessor's collective bargaining agreement.

The present case, of course, does not involve any of these situations. There is therefore no occasion for the Court here to consider or decide those questions.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it denies enforcement of the portion of the Board's order requiring Burns to honor the collective agreement, and the case should be remanded to that court with directions to enforce that requirement.

In all other respects, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1971.

APPENDIX

The relevant provisions of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 141, *et seq.*) are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

Sec. 8(a). It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * *

Sec. 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting com-

merce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-123

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BURNS INTERNATIONAL SECURITY SERVICES, INC., *et al.*

No. 71-198

BURNS INTERNATIONAL SECURITY SERVICES, INC., *et al.*,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

On Writs of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 120 national and international labor unions with a total membership of 13 and one-half million working men and women, files this brief *amicus*, in support of the position of the NLRB and the Union, with the consent of the parties.